IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

Prabhat & others Vs. State of Rajasthan
(D.B. Criminal Appeal No.1369/2003)

D. B. Criminal Appeal under Sec.374 (2) Cr.P.C. against the judgment dated 27-8-2003 in Sessions Case No.33/1998 passed by Shri Heera Lal Chanda, RHJS, Additional Sessions Judge Sambhar Lake District Jaipur.

Date of Judgment: August 20, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE GUMAN SINGH

Mr. Biri Singh Sinsinwar] for the appellants.
Mr. Kamlendra Sihag]

Mr. M.L.Goyal, Public Prosecutor for the State.

BY THE COURT: (PER HON'BLE Shiv Kumar Sharma,J.)

This appeal impugns the judgment dated August 27, 2003 of the learned Additional Sessions Judge Sambhar Lake District Jaipur whereby Prabhat, Kalu and Ram Narayan @ Goru, appellants herein, were convicted and sentenced under section 302/34 IPC to suffer imprisonment for life and fine of Rs.500/-, in default to further suffer simple imprisonment for two months.

2. As per prosecution story the dispute regarding agricultural land between the informant Ramdev and his cousins did not came to an end even after intervention of village Panchas. On July 20, 1998 around 4 PM Rishpal son of informant was belaboured by Prabhat, Kalu, Ram Narayan, Phool

Chand and their wives and daughters. Prabhat gave a blow with axe on the head of Rishpal. Informant's wife and another son Jagdish was also beaten up. Rishpal was removed to the hospital. Written report of incident (Ex.P-4) was handed over to SHO Police Station Renwal. On that report case under sections 447, 147 and 323 IPC was registered and investigation commenced. During the course of investigation Rishpal succumbed to his injuries and section 302 IPC was added. Autopsy on the dead body was performed, necessary memos were drawn, statements of witnesses were recorded, appellants were arrested and on completion of investigation charge sheet was filed against the appellants only. In due course the case came up for trial before the learned Additional Sessions Judge Sambhar Lake District Jaipur. Charges under sections 447, 302 alternatively 302/34, 323, 325 alternatively 325/34 IPC were framed against the appellants, who denied the charges and claimed trial. The prosecution in support of its case examined as many as 23 witnesses. In the explanation under Sec.313 CrPC, the appellants claimed innocence and stated that the complainant party gave beating to them. One witness Keshav Bihari Jhalani (Dw.1) in support of defence was examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellants as indicated above.

3. We have heard the submissions advanced before us and scanned the material on record.

4. Prior to his death Rishpal was examined vide injury report (Ex.P-26) which reads as under:-

> 1. Lacerated wound 2cm x ½ cm over mid parietal region, scalp tissue deep with dark red clotted blood
> 2. Neck under cervical collar with H/o unconscious neck and

C/o pain back of neck.
3. Lacerated wound 2cm x ½ cm muscle deep with dark red clotted blood.
4. Two parallel bruises of size 6cm x ½ cm with a gap of 1cm on dorsumdial aspect of Rt. forearm, bluish in colour.

As Post Mortem Report (Ex.P-27) the cause of death was coma due to injury to skull and brain with cumulative effect of injury to vertebra and spinal cord.

Jagdish (Pw.3) vide injury report (Ex.P-5) received following injuries:-

1. Swelling tenderness 3" x 2" lt. shoulder
2. Swelling tenderness 2½" x 2" Lt. arm upper ½
3. Swelling tenderness 3½" x 2½" Lt. wrist – palm
4. Abrasion ½" x ¼" Lt. index finger.
5. Bruise 2" x 1" Rt. back upper 1/3 simple

Ramdev (Pw.2) vide injury report (Ex.P-17) received following injuries:-

1. Swelling tenderness 2½" x 1½" Lt. Shoulder
2. Swelling tenderness 2" x 1½" arm lower.
3. Swelling tenderness 3" x 1" Lt. Forearm lower 1/3.
4. Abrasion 1" x ½" Rt. index finger.
5. Swelling 4" x 3" Rt. palm.
6. Swelling 1½" x 1" Rt. middle finger
7. Swelling 1" x 1" Rt. ring finger.
8. Swelling 1" x ½" Rt. little finger.

On x-ray vide report (Ex.P-22) fractures of ulna and fingers were found.

Soni Devi (Pw.4) vide injury report (Ex.P-18) received following injuries:-

1. Lacerated wound 2" x ½" x bone deep Lt. parietal
2. Abrasion 1" x ½" Lt. palm post aspect.

5. At this juncture injuries sustained by the accused party in the same incident may also be noticed. Appellant Prabhat vide injury report (Ex.D-10A) received following injuries:-

1. Lacerated wound 1½" x ½" bony deep Lt. parietal region.
2. Lacerated wound 2½" x ½" x muscle deep Lt. fore mid 1/3 post aspect.
3. Swelling 2½" x 1" Lt. forehead region
4. Swelling 3" x 1½" Rt. shoulder.
5. Abrasion 4½" x ¼" Lt. palm
6. Bruise 2" x 1" Rt. back

Injury report (Ex.D-11A) of appellant Goru reads as under:-

1. Abrasion ½" x ¼" Lt. palm.
2. Abrasion ¾" x ¼" Lt. thumb.
3. Abrasion 1" x ½" Lt. middle finger.
4. Swelling 3" x 1½" Lt. palm.
5. Swelling 3½" x 2" Lt. forearm.
6. Swelling 2½" x 1" Lower 1/3 Lt. leg.
7. Lacerated wound 1" x ½" x muscle deep Rt. forehead region.

Appellant Kalu vide injury report (Ex.D-12A) received following injuries:-

1. Lacerated wound 1½" x ½" Lt. forehead.
2. Swelling 3" x 2" Lt. leg upper 1/3.
3. Abrasion ¾" x ½" Lt. palm.
4. Abrasion 1" x ½" Rt. buttock

6. Coming to the testimony of Ramdev (Pw.2) we notice that he made improvements in his deposition at the trial. He attributed injuries on the foot, hand and neck of Rishpal to Ram Narayan and Kalu. He however stated that Prabhat inflicted blow from the blunt side of axe on the head of Rishpal. In the cross examination he admitted that accused party lodged

report against him. He did not explain the injuries sustained by the members of the accused party.

7. Fact situation emerges from the material on record may be summarized thus:-

(i) Members of complainant party and accused party were near relatives.
(ii) The agricultural land where the incident occurred, jointly owned and possessed by both the parties.
(iii) Accused Prabhat gave a blow from blunt side of axe on the head of Rishpal that proved fatal.
(iv) There was no allegation against accused Ram Narayan and Kalu in the FIR for having inflicted blows with lathi on the person of Rishpal.
(v) Cross cases were registered between the parties.
(vi) Members of accused party sustained lacerated wounds on the head and injuries sustained by the accused party were not explained by the prosecution witnesses.
(vii) Incident occurred all of sudden and both the parties fought freely.

8. Similar situation arose before the Hon'ble Supreme Court in Dharman v. State of Punjab (AIR 1957 SC 324) dispute regarding Shamlati land existed between the parties. The accused claimed that the land was in their possession whereas the party of the deceased put forward the claim that the land had been in their possession for many years. On the date of the incident a fight ensued. The deceased died in the course of a sudden and free

fight by the injury inflicted by the appellant. The deceased's party was also armed with dangerous weapons. Held by the Supreme Court, that when two such contending parties, each armed with weapons, when clashed and in the course of free fight some injuries were inflicted on one party or the other, it could not be said that either of them acted in cruel or unusual manner and the case against the appellant clearly fell within Exception 4 to Section 300 IPC.

9. Ratio indicated in Dharman v. State of Punjab (supra) is squarely applicable to the facts of the instant case. Appellant Prabhat, who has been attributed single injury on the head of the deceased with the blunt side of axe is found guilty under section 304 Part II IPC, since he had knowledge that he was causing such bodily injury as was likely to cause death.

10. That takes us to the allegations made against appellants Kalu and Ram Narayan, who have been convicted under section 302/34 IPC.

11. Section 34 as it originally stood, was in the following terms:

> "When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."

In 1870, it was amended by the insertion of the words "in furtherance of the common intention of all" after the word "persons" and before the word "each", so as to make the object of the section clear. Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intentions of all" nor does it say "an intention common to all". Under the section, the essence of that liability is to be

found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone.

12. It is trite law that section 34 IPC is only a rule of evidence and does not create a substantive offence. It means that if two or more persons intentionally do a thing jointly, it is just the same as if each of them has done it individually. Common intention requires a prior consent or a pre-planning. It is intention to commit the crime and the accused can be convicted only if such an intention has been shared by all the accused. Such a common intention should be anterior in point of time to the commission of the crime, but may also develop at the instant when such crime is committed.

13. As already noticed in the FIR it was not stated that Kalu and Ram Narayan inflicted any injury on the person of the deceased. It was only at the trial that Ramdev (Pw.2) made improvements in his testimony and attributed injuries on the person of deceased to them. On examining the testimony of Ramdev from the point of view of trustworthiness, we find it highly unreliable qua appellants Kalu and Ram Narayan and possibility that they have been over implicated cannot be ruled out. The prosecution in our opinion could not establish beyond reasonable doubt that they shared common intention with appellant Prabhat.

14. For these reasons, we dispose of instant matter in the following

terms:-

(i) We allow the appeal of appellants Kalu and Ram Narayan @ Goru and acquit them of the charges under section 302/34 IPC. These appellants are on bail, they need not surrender and their bail bonds stand discharged.

(ii) We partly allow the appeal of appellant Prabhat and instead of section 302/34 we convict him under section 304 part II IPC. Looking to the fact that the appellant has already undergone confinement for a period of more than six years, the ends of justice would be served in sentencing him to the period already undergone by him in confinement. Appellant Prabhat, who is in jail, shall be set at liberty forthwith, if he is not required to be detained in any other case.

(iii) The impugned judgment of learned trial court stands modified as indicated above.

(Guman Singh),J. (Shiv Kumar Sharma)J.

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